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RECREATIONAL BOATING LAW IN WISCONSIN

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INTRODUCTION

Recreational boating accidents in Wisconsin are subject to the interplay, pre-emption and application of state and federal statutory and substantive laws.[1] Generally, federal admiralty and maritime law applies to accidents occurring on federal admiralty waters, such as Wisconsin's Great Lakes and their tributory waters or on the Wisconsin portion of the Mississippi River and its tributaries, while state law applies to accidents occurring on Wisconsin's inland waters which are not subject to federal admiralty and maritime law. The site of the accident and the choice of forum are crucial factors in determining the procedure and outcome of the litigation.

The purpose of this article is to examine the laws applicable to the federal and state waters of Wisconsin, to discuss the principal rights of the parties to such litigation, and to consider the potential varying results of an identical fact situation occurring in each of these different waters.[2]

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1. During 1976 there were 161 reported boat accidents involving 226 boats in Wisconsin as the Department of Natural Resources (DNR) Bureau of Law Enforcement reports. (A reportable accident involves death, personal injury or in excess of $100 of property damage. WIS. STAT. § 30.67(2) (1975)).

These accidents accounted for $174,056 in property damage, 30 drownings, 4 deaths by traumatic impact, 38 major injuries and 63 minor injuries. One hundred (68%) of the accidents were caused by the fault of the boat operator. Twenty (12.4%) persons falling overboard and sixteen (9.9%) were fault of the equipment.

DNR, REPORT OF CERTIFICATES OF NUMBER ISSUED TO BOATS, U.S.C.G. Form CGHQ 3923.

These figures do not necessarily include accidents on Wisconsin's federal waters which are reportable to the United States Coast Guard under 46 U.S.C. §§ 1453(a), 1486 (1970).

2. As of December 31, 1976, there were 10,478 sailboats, 284,905 motorboats under 16 feet, 81,217 motor boats 16-26 feet, 2,322 motor boats 26-40 feet, 294 motor boats 40-65 feet, and 17 motor boats over 65 feet registered with the DNR pursuant to WIS. STAT. § 30.51 (1975). In addition, there are unknown numbers of sailboats under 12 feet, government boats, canoes and other boats not propelled by machinery which are exempt from registration. WIS. STAT. §§ 30.50(2) and 30.51 (1975). DNR, REPORT OF CERTIFICATES OF NUMBER ISSUED TO BOATS, U.S.C.G. Form CGHQ 3923. Over the last ten years, there has been a 125% growth in ownership of recreational boats. The

I. ADMIRALTY OR MARITIME ACTIVITIES — BACKGROUND

"The answer to [the question of what an admiralty or maritime activity is] will always be a little vague at the border line, no matter how long the process of judicial inclusion and exclusion goes on, and there were large doubts indeed, in the early days of the Republic, as to the extent of the power conferred."[3] In *DeLovio v. Boit*[4] the court's definition of admiralty court jurisdiction was that it "comprehends all maritime contracts, torts, and injuries . . . [and] extends over all contracts which relate to the navigation, business or commerce of the sea."[5] However, for the purpose and scope of this article, the federal admiralty jurisdiction applies to the chartering of boats,[6] the recovery of indemnity on marine insurance policies,[7] suits in tort for collision damage,[8] physical damage to vessels on navigable waters,[9] personal injuries,[10] wrongful death,[11] product liability claims,[12] and oil spills and their attendant damages.[13]

A. Nature and Jurisdiction of Admiralty Suits

Suits in admiralty are of two types: in personam and in rem. "The in personam suit is unproblematical to the shore lawyer; it is a suit against a named natural or corporate person, asserting a personal liability. The in rem suit is virtually unknown outside the admiralty courts,"[14] and is a suit against the inani-

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increased number and horsepower of recreational boats logically lead to additional speed, congestion and accidents on Wisconsin's navigable waters.

Wisconsin has 5.1% of all registered recreational boats nationally, not to mention Illinois' 3.8%, Iowa's 1.5%, and Minnesota's 5.4%, some of which will use Wisconsin waters. Milwaukee alone has an estimated 1.6% of all registered recreational boat owners in the country. *Boating '76* (distributed by the Boating Industry Assoc., 401 North Michigan Avenue, Chicago, IL 60611).

3. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 20 (2nd ed. 1975) [hereinafter cited as GILMORE & BLACK].

4. 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3,776).

5. *Id.*

6. Morewood v. Enequist, 64 U.S. (23 How.) 491 (1860).

7. Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 30-35 (1871).

8. Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

9. Philadelphia, W. & B. R.R. v. Philadelphia & Havre de Garce Steam Towboat Co., 64 U.S. (23 How.) 209 (1860).

10. The Admiral Peoples, 295 U.S. 649 (1935).

11. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

12. Schaeffer v. Michigan-Ohio Nav. Co., 416 F.2d 217 (6th Cir. 1969); Annot., 7 A.L.R. Fed. 502 (1971).

13. Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973); Annot., 26 A.L.R. Fed. 346 (1976).

14. GILMORE & BLACK, *supra* note 3, at 35.

mate object itself, whether ship or cargo, where it serves as the collateral for the action as well as the object of the action.[15] An admiralty action for personal injuries as well as other maritime torts can be brought as an in personam and/or an in rem action.[16] Tort claims can give rise to claims and/or judgments in personam and/or in rem.[17] As will be seen, in rem actions can only be brought before federal courts.[18]

The United States Constitution provides that "[t]he judicial power [of the United States] shall extend to all cases, in law and equity, arising under . . . the laws of the United States, . . . [and] to all cases of admiralty and maritime jurisdiction."[19] Congress conveyed to the United States district courts "original jurisdiction, exclusive of the Courts of the States, of any civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[20] The admiralty jurisdiction of the federal district courts is plenary and co-extensive with the constitutional grant to the federal government of the judicial power over admiralty and maritime matters.[21] As a result of such grant to the federal courts, states cannot create or enforce any admiralty or maritime rule that conflicts either directly or indirectly with federal law.[22] Consequently, admiralty law as created by Congress or the federal courts is controlling and may not be contradicted by either state statute[23] or by a judicial determination from a state court.[24]

Once the issue at bar is within the sphere of admiralty or maritime activity, the other criteria for federal court jurisdiction such as the amount in controversy,[25] diversity of citizen-

15. 2 AM. JUR. 2d, *Admiralty* § 94 (1962).

16. The City of Panama, 101 U.S. 453, 462 (1880); FED. R. CIV. P. Supplemental Rule C.

17. Reed v. The Yaka, 373 U.S. 410 (1973).

18. No in rem action can be brought in state courts because such an action is not known as a common law remedy, thereby depriving state courts of jurisdiction. The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867); The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867). See text accompanying notes 37-38, *infra.*

19. U.S. CONST. art. III, § 2, cl. 1.

20. 28 U.S.C. § 1333 (1970).

21. The Robert W. Parsons, 191 U.S. 17 (1903); Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578 (1883); Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1871).

22. Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928).

23. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955).

24. Madruga v. Superior Court, 346 U.S. 556 (1954).

25. 28 U.S.C. § 1332(a) (1970).

ship[26] or the presence of any federal question[27] are inapplicable.[28] However, if the action is being brought in a United States district court as an admiralty case under the "saving to suitors" clause[29] of the Judiciary Act, *i.e.*, an action in personam and not in rem, then the requisite federal jurisdictional fact such as the amount in controversy and diversity of citizenship must be alleged.[30] Thus, the mere fact that an admiralty question is involved or that there is a violation of the Motorboat Act of 1940[31] or the Federal Boat Safety Act of 1971[32] does not necessarily mean that there is a "federal question" under 28 U.S.C. section 1331(a).[33]

B. The Effect of the "Saving to Suitors" Clause

The so-called "saving to suitors" clause of the Federal Judiciary Act[34] creates a duality of maritime jurisdiction between the federal and state courts. The clause reserves to parties all common law rights and remedies which can be given by state courts. Such remedies are not restricted to proceedings as they originally existed in a state at the enactment of the federal legislation[35] but also encompass all new rights given by statute or state substantive law with the passage of time.[36] Although an in rem proceeding against the vessel as the offender[37] is not within the "saving to suitors" clause, a state is free to adopt such other remedies as it wishes and to prosecute the same so long as no substantive changes are made in the maritime law.[38]

State legislation and substantive law may not directly or indirectly contradict established federal maritime law but may

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26. *Id.*

27. *Id.* § 1331 (1970).

28. Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794); *Ex parte* Easton, 95 U.S. 68 (1877).

29. See discussion, footnotes 34-38 and accompanying text *infra*.

30. Romero v. International Terminal Operating Co., 358 U.S. 354 (1958).

31. 46 U.S.C. §§ 526-526u (1970 & Supp. V 1975).

32. *Id.* §§ 1451-1489 (Supp. V 1975).

33. *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 368-73 (1958).

34. 28 U.S.C. § 1333 (1970).

35. Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1873).

36. Panama R.R. v. Vasquez, 271 U.S. 557, 560-61 (1926); Warehouse & Builders Supply Co. v. Galvin, 96 Wis. 523, 527-28, 71 N.W. 804, 805-06 (1897).

37. Rounds v. Cloverport Foundry, 237 U.S. 303 (1915).

38. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924), *quoted in* Madruga v. Superior Court, 346 U.S. 556, 561 (1954); *see* WIS. STAT. § 801.07 (1975) as to when a Wisconsin court may exercise jurisdiction in rem or quasi in rem.

supplement federal law to the extent of allowing recovery in some cases where it would otherwise be denied.[39] Under state law, for example, wrongful death actions outside of the Jones Act,[40] the Longshoremen's and Harbor Workers' Compensation Act,[41] or the Death on the High Seas Act[42] had been treated as supplementing admiralty law[43] until becoming a federally recognized cause of action.[44] Prohibited contradictions of maritime laws are illustrated by cases which unsuccessfully attempted to apply state tort contribution law in admiralty[45] and cases in which the action was brought in the state court under the "saving to suitors" clause.[46]

The "saving to suitors" cause of action commenced in state court does not prevent its removal to a federal court as a nonadmiralty case if other jurisdictional requirements are met.[47] The result is that the plaintiff holding an in personam claim could enforce it in personam in admiralty or may, at his election, bring an ordinary civil action in either state or federal court without reference to admiralty where the federal jurisdictional prerequisites are met.[48]

II. Applying Admiralty Law

A. *State Proceedings*

Where the state courts have concurrent jurisdiction with the admiralty courts under the "saving to suitors" clause, the substantive law to be applied is that which would have been applied had the action been brought in admiralty court.[49]

Under the "saving to suitors" clause, the Supreme Court has modified the maritime jurisdictional definition of maritime

39. Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928).

40. 46 U.S.C. § 688 (1970).

41. 33 U.S.C. §§ 901-950 (1970 & Supp. V 1975).

42. 46 U.S.C. §§ 761-768 (1970).

43. The Hamilton, 207 U.S. 398 (1907).

44. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

45. *See, e.g.*, Atlantic Coast Line R.R. v. Erie Lackawanna R.R., 406 U.S. 340 (1972).

46. *See, e.g.*, Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918).

47. Williams v. Tide Water Ass'n Oil Co., 227 F.2d 791 (9th Cir. 1956), *cert. denied*, 350 U.S. 960 (1956).

48. Rounds v. Cloverport Foundry, 273 U.S. 303 (1915); Leon v. Galceran, 78 U.S. (11 Wall.) 185 (1871).

49. Kossick v. United Fruit Co., 365 U.S. 731 (1961); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918).

torts. A tort subject to the admiralty jurisdiction will be subject to admiralty substantive law if the "substance and consummation" of the tort occurred on navigable waters of the United States.[50] This conceptual test of locality was applied to encompass recreational boating in *Coryell v. Phipps*.[51]

The locality test was further modified in 1962 by the Supreme Court's adoption of the "locality-plus" test for maritime tort jurisdiction.[52] This test requires that the wrong must have some relationship to a maritime service, navigation, or commerce on navigable waters in addition to satisfying the previous locality test. There must be such a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction. An example of the operation of the locality-plus test is *Oppen v. Aetna Insurance Co.*[53] where pleasure boat owners were permitted to sue in admiralty on a maritime tort theory for damages caused by the 1969 Santa Barbara oil spill. The court specifically determined that pleasure boating is a traditional maritime activity within the scope of *Executive Jet Aviation, Inc. v. City of Cleveland*.[54] Similarly, a woman thrown from a negligently operated pleasure boat in federal waters was able to recover in admiralty by treating the operation of pleasure boats as an historic maritime activity.[55] A split of opinion exists on the issue of whether water skiing is a recognized maritime activity and therefore subject to admiralty rules and procedures.[56]

B. Wisconsin Maritime Suits

In *Karasich v. Hasbrouck*[57] a boating accident in Milwaukee harbor was treated as any other Wisconsin tort action and the defense of contributory negligence which normally is not recognized in admiralty was permitted. Since factually this was clearly an admiralty case, it can only be assumed that it was conducted as a tort case because no party raised the admiralty issue or removed it to federal court.

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50. The Plymouth, 70 U.S. (3 Wall.) 22 (1865).

51. 317 U.S. 406 (1943).

52. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).

53. 485 F.2d 252 (9th Cir. 1973).

54. 409 U.S. 249 (1972).

55. St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974); Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973).

56. Annot., 8 A.L.R.3d 675 (1966); 12 AM. JUR. 2d *Boats and Boating* § 54.

57. 28 Wis. 569 (1871).

In *Georgia Casualty Co. v. American Milling Co.*[58] a longshoreman's action which antedated the federal act equivalent to longshoremen's worker's compensation[59] was conducted as an ordinary civil action in tort and involved the contributory negligence of the plaintiff. Although there are no admiralty comments in the case, the action was permissible under the "saving to suitors" clause since it was in personam and not in rem.[60]

Warehouse & Builder's Supply Co. v. Galvin[61] involved a replevin action by the owner-shipper of goods against the carrier of the goods and the ship's lien (in rem) upon the goods. In contrast, the state action was dismissed because it was admiralty in nature, and, as such, solely vested in the federal courts under article III, section 2, United States Constitution, and not preserved by the "saving to suitors" clause of the Judiciary Act. This is the only case dismissed by the Wisconsin Supreme Court on the issue of lack of state court admiralty jurisdiction.

C. Applicable Navigational Rules

The navigational rules for both the Mississippi River and the Great Lakes and their tributaries were adopted for the purpose of preventing collisions.[62] Each set of rules is categorized into six basic divisions. The preliminary division provides the general applicability, definitions and penalties for violations.[63] The rules apply to all boats regardless of type, mode of propulsion or size.[64]

The provisions include special lighting requirements used under varying conditions on different types of boats.[65] Also included are regulations applicable to operations in a fog,[66] such as requirements regarding bells, whistles or sirens that are to be used in a fog.[67] The "rules of the road" provide for safe

58. 169 Wis. 456, 172 N.W. 148 (1919).
59. 33 U.S.C. §§ 901-950 (1970 & Supp. V 1975).
60. 169 Wis. at 460-61, 172 N.W. at 155, *citing* Standard Oil Co. v. Anderson, 212 U.S. 215 (1909).
61. 96 Wis. 523, 71 N.W. 804 (1897).
62. 33 U.S.C. §§ 241, 301 (1970).
63. *Id.* §§ 241-244 (1970).
64. *Id.* §§ 242, 302 (1970).
65. *Id.* §§ 251-262, 311-323 (1970); 46 U.S.C. §§ 526-527(u) (1970 & Supp. V 1975).
66. 33 U.S.C. §§ 271-272, 331-341 (1970); 46 U.S.C. §§ 526c, d (1970).
67. *Id.*

steering and sailing.[68] Deviation from them is permitted when special circumstances exist which require departure in order to avoid immediate danger.[69] Also included are provisions against negligent operation and acts,[70] and the penalties that may be imposed.[71] Finally, the commandant of the Coast Guard is authorized to promulgate regulations for the implementation of the above rules.[72]

The Great Lakes Rules have no specific provisions for safety equipment (other than lights) except that sailing vessels must have an efficient fog horn and bell.[73] The Mississippi River Rules do not require a sailboat to have any safety equipment other than lighting except for bells on sailing vessels over twenty-ton gross weight.[74] However, the Motorboat Act of 1940 does require various safety equipment on all boats capable of being propelled by machinery and under 65 feet in length which operate on federal navigable waters, including the Great Lakes and the Mississippi River.[75] The Act, in addition to requiring lighting equipment and bells, requires life preservers, fire extinguishers, carburetors equipped with flame arrestors, and ventilating equipment.[76] On its inland waters, the Wisconsin law requires, in addition to lighting equipment on all boats, adequate mufflers, life preservers, fire extinguishers, carburetor flame arrestors, ventilators, and battery covers.[77]

Lakes Michigan and Superior and their tributaries together with the Mississippi River and its tributaries are within the federal admiralty jurisdiction.[78] Pine Creek, in the City of Kenosha, Wisconsin, is within the federal jurisdiction too.[79] By the

68. 33 U.S.C. §§ 281-293, 341-351 (1970).

69. *Id.* § 292 (1970).

70. 46 U.S.C. § 1461(d) (Supp. V 1975).

71. *Id.*

72. 33 U.S.C. § 243 (1970). *See* 33 U.S.C. § 353 (1970) (which is a similar provision granting authority to establish navigational rules for certain western waters). *See also* 49 C.F.R. § 1.46(b) (1977). These Coast Guard regulations may be found in 33 C.F.R. § 90.01-6, 95.01-.80 (1977); Rules of the Road—Great Lakes, C.G.-172 (July 1, 1972); Rules of the Road—Western Rivers, C.G.-184 (August 1, 1972).

73. 33 U.S.C. § 271 (1970).

74. *Id.* § 331 (1970).

75. 46 U.S.C. §§ 526-526u (1970 & Supp. V 1975).

76. *Id.* §§ 526b-e, 526g-i (1970).

77. WIS. STAT. §§ 30.62 (1975); WIS. ADM. CODE §§ NR 5.10, .11, & .13.

78. The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 453-57 (1851).

79. 33 U.S.C. § 57 (1970).

process of exclusion, all other waters of the State of Wisconsin are nonadmiralty inland waters and subject solely to the laws and procedures of the state.[80]

In examining the Wisconsin rules, the various requirements for sail and motor boats on the state's inland waters are found in Chapter 30 of the Wisconsin Statutes. The "rules of the road" are concerned with traffic,[81] speed restrictions[82] and general prohibited operations[83] which include intoxicated or negligent operation, improper seating of passengers, creating a hazardous wake, anchoring in traffic lanes, overloading, overpowering, and unnecessary noise. Reckless conduct and operation of a recreational boat could well be contained within the scope of the Wisconsin criminal statute against conduct regardless of life.[84]

The enforcement of the federal boating laws has been delegated to the United States Coast Guard[85] and for inland waters to the Department of Natural Resources of the state and local authorities.[86]

If the Coast Guard officer reasonably believes a boat is being operated in a negligent manner or that it lacks the required safety equipment thereby creating "an exceptionally hazardous condition," he can board and inspect the boat, direct it to return to port or take other steps reasonably necessary for crew and occupant safety.[87] On state waters, a Wisconsin law enforcement officer who has "reasonable cause to believe there is a violation"[88] may stop and board a boat for the purpose of enforcing the state's boating laws, regulations or ordinances.

D. Resulting Peculiarities

Past application of admiralty law in state or federal courts has brought about what may be considered peculiar results pertaining to trial by jury and divided damages. In regard to

80. *See* Morse v. Home Ins. Co., 30 Wis. 496, 505-07 (1872) (concerning the Fox and Wolf Rivers). *See generally* GILMORE & BLACK, *supra* note 3, at 32-33.

81. WIS. STAT. § 30.65 (1975).

82. *Id.* § 30.66 (1975).

83. *Id.* § 30.68 (1975).

84. *Id.* § 941.30 (1975).

85. 33 U.S.C. §§ 243, 353 (1970); 46 U.S.C. § 526 (1970).

86. WIS. STAT. §§ 30.74(3), .77 (West 1973).

87. 46 U.S.C. § 1462 (Supp. V 1975).

88. WIS. STAT. ANN § 30.79(3) (West 1973).

trial by jury, the general rule is that admiralty cases are tried by the court with no right to such a jury.[89] But Congress does have the right to provide for a trial by jury in admiralty cases if it deems it appropriate,[90] and it has so provided for jury trials with respect to admiralty suits brought on the Great Lakes.[91] The general rule that there is no right to a jury trial in admiralty suits is applicable, however, to the Mississippi River.

Pertaining to damages, if the boating accident occurred on the inland waters of Wisconsin, the state law of comparative negligence would apply.[92] However, in admiralty, comparative negligence is not applicable. Rather, the divided damages rule is used whether the case is tried in either a Wisconsin or federal court.[93] If, however, the action is for wrongful death, the state's rules on contributory or comparative negligence will be applied.[94] Should the wrongful death action arise under a federal statute then this pre-empts the application of the state law.[95] The two main federal wrongful death statutes are the Jones Act[96] and the Death on the High Seas Act.[97] The Death on the High Seas Act, however, is not applied to the Great Lakes or the Mississippi River by definition,[98] and the Jones Act is only applicable to the extent that the injured or deceased person is a seaman employee of the vessel. Absent a federal statute, the state's wrongful death statute will be enforced in an admiralty proceeding whether the proceeding is in rem (against only the ship itself) or in personam (against individuals).[99] An admiralty cause of action for wrongful death in rem against the vessel does not lie in either admiralty or state court unless, under the state law, the claimant actually has a right to an in rem action leading to a lien against the property.[100] Wisconsin has no in rem action for wrongful death.

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89. The Margaret, 22 U.S. (9 Wheat.) 116 (1824); FED. R. CIV. P. § 1, 9(h), 38(c), 81.

90. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943).

91. 28 U.S.C. § 1873 (1970).

92. WIS. STAT. ANN. §§ 895.045, .048 (West 1966).

93. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

94. Hess v. United States, 361 U.S. 314 (1960).

95. Lindgren v. United States, 281 U.S. 38 (1930).

96. 46 U.S.C. § 688 (1970).

97. *Id.* §§ 761-68 (1970).

98. *Id.* § 767 (1970).

99. Just v. Chambers, 312 U.S. 383 (1941).

100. The Corsair, 145 U.S. 335 (1892).

The effect of the admiralty divided damages rule is that the total damages of all parties are divided by the number of parties found to be at fault in any degree with those parties at fault being jointly and severally liable to all parties whether at fault or not.[101]

An example of the different results achieved under the admiralty divided damages rule and the Wisconsin comparative negligence rule (the application of which is solely dependent on the situs of the accident) is as follows: Assume factually that boat A is 90 percent at fault, having sustained damages of $50,000, and that boat B is 10 percent at fault with damages of $1,000. If the accident had occurred on Wisconsin's federal waters, each party would be liable for one-half of the damages, or $25,000, under admiralty's divided damages rule. Had the accident occurred on Wisconsin inland waters, boat A would be liable for $50,000 plus 90 percent of $1,000 or $50,900 and boat B for 10 percent of $1,000 or $100. Both boat A and B would be jointly and severally liable to any third party not at fault either under admiralty or Wisconsin law.[102] As a result of the divided damages rule, it is imperative that in a federal waters accident case in either state or federal court a defendant should not only answer denying liability but also should allege affirmatively the negligence of the plaintiff and counter-claim for his own damages.

III. Tort Concepts in Admiralty Law

A. *Concepts of Fault*

On the state's inland waters, comparative negligence rules are applicable.[103] However, the admiralty rule of divided damges is applicable in state court under the "saving to suitors" clause or in federal court if the accident occurred on Wisconsin's federal waters.[104]

The effects of admiralty fault are as follows: If neither vessel is at fault, each must pay its own losses and no liability attaches.[105] If the collision is the fault of one of the vessels only,

101. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).

102. *Id.*; Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

103. Wis. Stat. §§ 895.045, .048 (1975); Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970).

104. The Schooner Catherine v. Dickinson, 58 U.S. (17 How.) 434 (1855).

105. The Clara, 102 U.S. 200 (1880).

that vessel must bear its own loss and pay the other's damages as well.[106] Where both vessels are at fault, regardless of relative degree of fault, the damages are equally divided between them so that each vessel bears one-half of the total damages.[107] It should be noted that this would be quite a deviation from the concept of comparative negligence applicable to the state's inland waters.[108]

It is customary in an admiralty collision case for the defendant to counterclaim against the plaintiff because of the effect of the fault rules. If the defendant merely answers by denying his own fault and the court then finds both boats at fault, the answering defendant's damages are not taken into account. Where the counterclaiming defendant can place all fault on the plaintiff, he can then recover all of his damages from the plaintiff. Even where there is little damage suffered by the defendant, he can reduce his liability to half by having the court find any degree of fault with respect to the plaintiff.[109] Therefore, a defendant involved in a boating accident on Wisconsin's federal waters and who is in a state court under the "saving to suitors" clause should carefully evaluate the invoking of admiralty rules for tort damages either in the state court or through removal to federal court.

It should be noted that a state court sitting in its concurrent jurisdictional capacity in an admiralty matter cannot apply under the "saving to suitors" clause the common law defenses of contributory negligence, fellow servant rule, assumption of risk, measure of recovery, or comparative negligence, since these are common law or state law and not admiralty concepts.[110]

Admiralty liability resulting from collisions is premised on fault and not on the mere fact that there was an impact between two vessels or a vessel and another object.[111] There are two types of fault which permit the party to a collision to avoid liability. These are "inscrutable" fault and "inevitable" accident. "Inscrutable fault" occurs when "the Court can see that

106. *Id.*

107. The Schooner Catherine v. Dickinson, 58 U.S. (17 How.) 434 (1855).

108. WIS. STAT. §§ 895.045, .048 (1975).

109. GILMORE & BLACK, *supra* note 3, at 498-500.

110. Pope & Talbott v. Hawn, 346 U.S. 406 (1953); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

111. The Java, 81 U.S. (14 Wall.) 189 (1872).

a mere fault has been committed but is unable, from the conflict of testimony, or otherwise, to locate it."[112] Under this doctrine, the settled rule is that no one can recover anything from anyone else.[113]

The second type of excusable fault is that of an "inevitable" accident. This is equivalent to an Act of God where all reasonably required precautions have been taken and the accident occurred anyway.[114] Inevitable accidents have been referred to by admiralty courts as "unavoidable."[115] The phrase "inevitable fault" means that neither party has been able to sustain its burden of proving the fault of the other. "The 'inevitable accident' defense is most often invoked when a vessel has been caught in the force of a storm and driven against another vessel or vessels" or otherwise caused damage or injury.[116] In such a case, the presumption is against the moving vessel although rebuttable by the "inevitable accident concept."[117] There are two factors to be considered in the "inevitable accident" defense: "(1) the reasonableness of precautions taken and (2) the circumstances known or reasonably to be anticipated."[118]

A narrow exception to the strict enforcement of the rules and standards of prudent navigation is found in the doctrine of *errors in extremis.* This exception applies where "the vessel through no fault of its own is placed in a position where collision is seemingly imminent and shall not be cast at fault for action taken in violation of the Rules" or other standards of due care in order to attempt to avoid the accident.[119]

B. Duties and Standards of Care

The concept of "fault," as discussed above, is based on the assumption that there is a proper standard applicable to the operation of boats. There are four possible sources for the maritime "rules of the road" on Wisconsin waters:

(1) Statutory rules of navigation which are comprised of

112. The Worthington & Davis, 19 F. 836, 839 (E.D. Mich. 1883).
113. The Grace Girdler, 74 U.S. (7 Wall.) 196 (1869).
114. *See* Steinback v. Rae, 55 U.S. (14 How.) 532 (1852).
115. Dunton v. Allen S.S. Co., 119 F. 590 (3d Cir. 1903).
116. GILMORE & BLACK, *supra* note 3, at 488.
117. The Louisiana, 70 U.S. (3 Wall.) 164 (1866).
118. GILMORE & BLACK, *supra* note 3, at 488.
119. *Id.* at 491.

the Great Lakes Rules,[120] the Western Rivers Rules,[121] and the Wisconsin inland waters rules.[122]

(2) Administrative rules and regulations, the so-called "Pilot Rules" issued by the Coast Guard.[123]

(3) Established local "customs" not contradicting any of the preceding.[124] It should be noted that of the cases that will be discussed, *The John D. Rockefeller*[125] represented an application of a local rule on the Mississippi River that was treated as a justifiable departure from the requirements of the Western Rivers special circumstances rule.[126]

(4) The general requirements of good seamanship and due care.[127]

The violation of the applicable statutes or regulations in an accident situation is considered statutory fault (negligence per se) in admiralty, and in order to escape liability, it must be shown that such fault did not and could not have contributed to causing the accident.[128] In *The Farragut,* the ship failed to maintain a proper lookout, but it became aware of the other ship in sufficient time so that the fault could not have had a causal connection with the subsequent collision. Under the *Pennsylvania* rule, the vessel guilty of statutory fault must prove that such fault did not and could not have contributed to or caused the accident.[129] The violation of either the Wisconsin boating and safety statutes or regulations would be considered as negligence per se.[130] It should be noted that the rules applicable to the Great Lakes and the Mississippi River and their respective tributaries and to the Wisconsin inland waters are neither identical nor interchangeable. Depending on the situs of the tort, the specific rule applicable to that particular

120. 33 U.S.C. §§ 241-95 (1970).

121. *Id.* §§ 301-56 (1970).

122. WIS. STAT. §§ 30.50-.99 (1975).

123. The Great Lakes Regulations are contained in 33 C.F.R. §§ 90.01-.30 (1972). The Western River Rules are contained in 33 C.F.R. §§ 95.01-.80 (1972). The Wisconsin inland waters rules are found in WIS. ADM. CODE § NR5.

124. Union Oil Co. v. Tug Mary Malloy, 414 F.2d 669 (5th Cir. 1969); The John D. Rockefeller, 272 F. 67 (4th Cir. 1921); The Transfer No. 21, 248 F. 459 (2nd Cir. 1917); The Lucerne, 204 F. 981 (2nd Cir. 1913).

125. 272 F. 67 (4th Cir. 1921).

126. 33 U.S.C. § 350 (1970).

127. Miller v. Allied Chem. Corp., 406 F.2d 1037 (4th Cir. 1969).

128. The Farragut, 77 U.S. (10 Wall.) 334 (1870).

129. The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873).

130. Weiss v. Holman, 58 Wis. 2d 608, 207 N.W.2d 660 (1973).

body of water should be carefully studied.

In federal water, any boat[131] which is involved in a collision, accident or other casualty is required to render all practical and necessary assistance to persons and property affected by the collision, accident or casualty and to save them from danger caused by collision, accident or casualty to the extent possible without seriously endangering his own vessel or persons aboard.[132] Any person rendering such assistance is excluded from civil damages where he acted as an ordinary, reasonable and prudent person would have acted under the same or similar circumstances.[133]

On Wisconsin's waters, all boats,[134] whether or not involved, are required to stop and render assistance[135] upon notice of a collision,[136] but such boats do not enjoy the benefit of statutory exoneration for due care as provided in federal law.[137] At common law, the Wisconsin boater who was not a contributing cause of the accident and who stopped to render assistance in an emergency situation was liable for damages only where his action or inaction was not reasonable or prudent under the then existing emergency conditions.[138] Where the emergency was caused in whole or in part by his own negligent act[139] or as a matter of law *(i.e.,* a navigational rule violation),[140] the emergency (rescue) doctrine is not applicable.

The Wisconsin law requires the rendering of assistance regardless of a boater's involvement. In contrast, the federal rule is applicable only in the event of involvement. The admiralty rule, however, exonerates even the original tortfeasor for his subsequent rescue attempts when reasonably done under the then existing circumstances. Wisconsin's rule has no subsequent exoneration when a boater was originally at fault for the accident.

Where a vessel fails to stand by and render assistance as required by the federal acts, it is presumed to be at fault for

131. 46 U.S.C. § 1452(1), (2) (Supp. V 1975).
132. 33 U.S.C. § 367 (1970); 46 U.S.C. § 1465(a) (Supp. V 1975).
133. 46 U.S.C. § 1465(b) (Supp. V 1975).
134. WIS. STAT. § 30.50(1) (1975).
135. *Id.* § 30.67(1) (1975).
136. *Id.* § 30.675(1) (1975).
137. 46 U.S.C. § 1465(b) (Supp. V 1975).
138. Zillmer v. Miglautsch, 35 Wis. 2d 691, 151 N.W.2d 741 (1967).
139. Ivy v. Tower Ins. Co., 32 Wis. 2d 231, 145 N.W.2d 214 (1966).
140. Conery v. Tackmaier, 34 Wis. 2d 511, 149 N.W.2d 575 (1967).

the collision and is subject to federal[141] or state[142] criminal penalties. This presumption is rebuttable by proof to the contrary.[143]

C. *Wrongful Death Action*

Admiralty law has two wrongful death statutes. One is the Jones Act[144] which pertains to crew members for hire and to their injuries and/or death occurring while within the scope of their employment. The other is the Death on the High Seas Act[145] which covers the death of any person as a result of "wrongful act, neglect or default occurring on the High Seas."[146]

The Jones Act is applicable to death and/or injury claims on Wisconsin's federal waters where the claimant is an employee of the boat owner or operator and had been acting within the scope of his employment when injured.[147] The action can be brought in either a state or federal proceeding, but it remains subject to federal substantive law in either court.[148] Unlike Wisconsin's Worker's Compensation Law, there are no damage limitations,[149] and the cause of action exists upon the employer's negligence.[150]

Ordinarily, passengers and co-operators of a pleasure boat are not treated as employees under the Jones Act since there is no financial consideration given for their services. However, where a person is treated as a common law employee or is "working his passage," he may be treated as an employee which entitles him to recovery under the Jones Act.[151] This amounts to a rough equivalent of marine worker's compensation. A seaman has been defined as anyone who in the course of his work exposes himself to risks traditionally associated with maritime duties of a ship's crew.[152] The Jones Act further

141. 46 U.S.C. §§ 1465(a), 1483 (Supp. V 1975).
142. WIS. STAT. §§ 30.67(1), 30.80(2) (1975).
143. Greaud v. Gulf Oil Corp., 174 F.2d 369 (5th Cir. 1949); Coule Lines v. United States, 96 F. Supp. 821 (E.D. La. 1951).
144. 46 U.S.C. § 688 (1970).
145. *Id.* § 761-68 (1970).
146. *Id.* § 761 (1970).
147. Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129 (1959).
148. Beadle v. Spencer, 298 U.S. 124 (1936).
149. Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918).
150. DeZon v. American President Lines, Ltd., 318 U.S. 660 (1943).
151. *In re* Read's Petition, 224 F. Supp. 241 (S.D. Fla. 1963).
152. Garrett v. Gutzeit, 491 F.2d 228 (9th Cir. 1974).

includes recovery for injury or death resulting from the unseaworthiness of the boat. This is a legal concept of liability without fault. The seaman need only show that the injury was caused by the boat not being reasonably fit for its intended use.[153]

The Death on the High Seas Act is not applicable to Wisconsin because of the jurisdictional definition of what constitutes the "high seas."[154] Therefore, there is no federal statute for the wrongful death of a nonseaman occurring in a state's territorial waters.[155] But where there is a state statute creating a wrongful death action for a tort committed on its territorial waters, the admiralty court will entertain a suit in personam for damages.[156]

Wisconsin's wrongful death statutes[157] are applicable to the death of a passenger, third-party or a nonemployee crew member on the state's inland and federal waters.[158] The action is in personam and can be brought in either state or admiralty court,[159] both of which must apply Wisconsin substantive law.[160]

The Federal Boat Safety Act of 1971[161] provides for certain safety requirements and standards in manufacturing, construction and furnishing of equipment for all types of recreational boats.[162] Violations of these equipment standards by a manufacturer or supplier could result in product liability being imposed on the manufacturer, retailer or lessor of the boat and/or its component parts.[163]

A vicarious liability suit for the nonowner-user's negligent operation of a boat can be maintained against the owner in an

153. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

154. 46 U.S.C. § 761 (1970); Warnken v. Moody, 22 F.2d 960 (5th Cir. 1921); O'Brien v. Luckenbach S.S. Co., 286 F. 301 (D.C. N.Y. 1922), *rev'd,* 293 F. 170 (2nd Cir. 1923).

155. The Tungus v. Skovgaard, 358 U.S. 588 (1959).

156. *Id.*

157. WIS. STAT. §§ 895.01, 895.04 (1975).

158. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

159. Levinson v. Deupree, 345 U.S. 648 (1953).

160. The Tungus v. Skovgaard, 358 U.S. 588 (1959).

161. 46 U.S.C. §§ 1451-1489 (Supp. V 1975).

162. *Id.* §§ 1454, 1455 (Supp. V 1975).

163. *See* Schaefer v. Michigan-Ohio Nav. Co., 416 F.2d 217 (6th Cir. 1969); George v. Tonjes, 414 F. Supp. 1199 (W.D. Wis. 1976); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); 12 AM. JUR. 2d *Boats and Boating* § 85 (1964); Annot., 7 A.L.R. Fed. 502 (1971).

admiralty in rem action for the value of the boat, but not in personam absent a statutory enactment.[164] The Federal Boat Safety Act directly affects the user by imposing any personal liability of the owner upon the user in personam.[165] Wisconsin has no vicarious liability running from the negligence of the user to the owner who is not the lessor in a products liability situation.[166] Other states have imposed vicarious liability on the owner for the negligent operation of a boat by the nonowner-user.

D. Damage Relief and Insurance

A ship is liable for the damages it has caused resulting in an in rem judgment against the ship itself.[167] The judgment creates a lien which will allow the ship to be sold free and clear of all other claims or security interests regardless of time of perfection. It does not seem very practical to sue most pleasure boats in rem because the boat itself has relatively limited value and a judgment in rem against the ship will serve as res judicata to an in personam claim against the owner. However, because charter boats often are of substantial value, an in rem claim against the boat may be considered where there may be no liability of the lessor and the charterer does not have sufficient assets or insurance. The fact that a boat is chartered in no way effects an in rem claim or lien created by the tortious use of the boat by the charterer.[168]

Unlike state courts, admiralty courts may award attorney's fees to the successful party as part of his damages.[169] Costs are divisible at the discretion of the court.[170] Interest,[171] actual damages,[172] and pain and suffering[173] are all elements of dam-

164. The Barnstable, 181 U.S. 464, 467-68 (1901).

165. 46 U.S.C. § 1461(c) (Supp. V 1975).

166. In George v. Tonjes, 414 F. Supp. 1199, 1201-02 (W.D. Wis. 1976) the federal court (1) noted the past sensitivity of the Wisconsin Supreme Court in adopting new trends in the products liability field, (2) concluded that in Wisconsin there could be a valid cause of action for strict liability in tort against lessors, and (3) held that there were sufficient allegations to state a claim against the defendants, who were negligent in leasing a defective aircraft.

167. The Barnstable, 181 U.S. 464 (1901).

168. *Id.*; Burns Bros. v. The Central R.R., 202 F.2d 910 (2nd Cir. 1953).

169. Fleishmann v. Maier Brewing Co., 386 U.S. 714 (1967); Vaughan v. Atkinson, 369 U.S. 527 (1962); The Appollon, 22 U.S. (9 Wheat.) 88 (1824).

170. The Scotland, 118 U.S. 507 (1886).

171. United States v. The Thelsa, 266 U.S. 328 (1924).

172. Brooklyn E. Dist. Terminal v. United States, 287 U.S. 170 (1932).

173. Lauritzen v. Larsen, 345 U.S. 371 (1952); The City of Panama, 101 U.S. 453 (1880).

ages in admiralty as they are in Wisconsin state court practice.

On federal waters, a crewman is entitled to the right of maintenance and cure against the ship (in rem) and against the owner-employer (in personam).[174] In the case of a bareboat charter, the remedy lies only against the ship and the charterer-employer, but not against the boat owner.[175] He is entitled to recovery for any injury or illness suffered without his own misconduct while a member of the ship's crew, without any causal relationship between the injury or illness and his shipboard duties, including his periods of shore leave.[176]

The nature of relief is for room, board, medical, and travel expenses to his home upon recovery.[177] An injured crewman on federal waters is entitled to recovery for maintenance and cure in addition to any remedies available under the Jones Act.[178] This remedy applies to pleasure boats as well as commercial vessels when the owner is placed in the role of employer of the injured or sick worker and when the injury is not conditioned upon the owner's negligence.[179] The owner's obligation to a crewmember for maintenance and cure is not eliminated by, but is coextensive with, his obligations under the Jones Act[180] since those obligations arise when the owner is negligent. There is an absolute duty to furnish a seaworthy vessel whether as the owner, operator[181] or lessor of a chartered boat.[182] Under common law, liability for maintenance and cure arises regardless of the owner's negligence.[183]

Protection from the above-discussed liabilities and damages is provided by three types of insurance policies that are generally available to the recreational boater: (a) the yacht policy, (b) the outboard motorboat policy, and (c) the home-

174. The Osceola, 189 U.S. 158 (1903).

175. Haskins v. Point Towing Co., 421 F.2d 532 (3rd Cir. 1970).

176. Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938).

177. Waterman S.S. Co. v. Jones, 318 U.S. 724 (1943).

178. Waterman S.S. Co. v. Jones, 318 U.S. 724 (1943); Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928).

179. GILMORE & BLACK, *supra* note 3, at 283-84.

180. 46 U.S.C. § 688 (1970).

181. Woldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); The Osceola, 189 U.S. 158 (1903).

182. Luckenbach v. W.J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918); Work v. Leathers, 97 U.S. 379 (1878).

183. Fitzgerald v. A.L. Benhands & Co., 475 F.2d 165 (2nd Cir. 1973).

owner's policy.[184] The first two types of policies are true marine insurance policies relative to the terms and provisions of coverage. The homeowner's policy, unlike the marine policies, is not directed to a specifically named boat, but treats the boat owned by the insured homeowner as an adjunct piece of property and subjects it to other terms and conditions of the homeowner's policy relative to coverage, damage and liability. A typical homeowner's policy restricts the insured boat to length and/or specified horsepower. The homeowner's policy also restricts the perils against which the boat is being insured by excluding wind or hail damages where the boat is outside the enclosure of the principally insured building, theft while the boat is left unattended, and bodily injury or property damage arising out of the ownership of the boat where the horsepower and/or length limitations are exceeded.

The terms and conditions of a marine policy are treated as an integral part of admiralty and maritime jurisdiction and are subject to litigation and determination in the federal admiralty court.[185]

A typical marine or yacht policy will be divided into three main categories: (1) hull insurance, covering the ship itself, (2) protection and indemnity, covering the boat owner against liabilities, and, (3) payment insurance for reasonable medical and funeral expenses incurred as a result of injuries sustained while on the craft or while boarding or leaving it. A marine yacht policy will specify the specific person and property insured, the location and insured geographical area of use of that property, and insured and excepted uses. It is common on a yacht policy to exclude commercial use of the boat and damages incident to racing sailboats. It further specifies the exact nature of the perils to the hull which typically may include an all risk coverage.

A term in a marine policy which normally does not appear in the homeowner's coverage is the requirement of seaworthiness of the insured boat as a condition precedent to any enforceable coverage. The failure of seaworthiness of the vessel voids *ab initio* the marine insurance coverage.[186] The voiding of the marine insurance policy for lack of seaworthiness does not

184. Jaques, "Maritime Law and the Small Boat Owner," CASE & COMMENT 3 (May-June 1977).

185. DeLovio v. Boit, 7 F. Cas. 418, 444 (C.C.D. Mass. 1913) (No. 3776).

186. New Orleans, T. & M. Ry. v. Union Marine Ins. Co., 286 F. 32 (5th Cir. 1923).

depend on either the named insured's knowledge[187] or fault.[188] Where the marine policy is a time policy, the "American Rule" states that there is no implied warranty of seaworthiness in such a policy.[189] The Supreme Court has not ruled directly on the "American Rule" with respect to time marine insurance policies and the implied warranty for seaworthiness. It is assumed, however, that if called upon to deal with this issue, the Supreme Court would not uphold the warranty.[190]

E. Chartering a Boat

Chartering contains a few pitfalls of which the boat owner should be advised. The charter agreement or instrument is called a "charter party." It is "a specific and . . . express contract by which the owner lets a vessel or some peculiar part thereof to another for a specific time or use."[191] An operator may wish to charter a boat rather than purchase it, or he may wish to lease out his own boat when he cannot use it. In either event, he should be aware of the types of contracts available. A "bareboat" or "demised" charter is created when the owner of the vessel completely and exclusively relinquishes possession, command and navigation of the boat. It is just short of transfer of ownership.[192] Control is the indication of a bareboat charter. The charterer is entitled to direct navigation and employment of the boat,[193] and he pays the crew wages and all operating expenses and, furthermore, the full legal liabilities of ownership fall upon him.[194]

In contrast, a "time charter" is where the vessel is leased to the charterer but the management and control remains with the owner, such as in the case of the chartered fishing party boat. The owner selects and pays the master and all the operating expenses. Liability remains in the owner since he is still in control.[195]

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187. Richelieu & Ontario Navigation Co. v. Boston Marine Ins. Co., 130 U.S. 408 (1890).

188. Bullard v. Roger-Williams Ins. Co., 4 F. Cas. 643 (C.C.D. R.I. 1852) (No. 2,122).

189. New York, New Haven & Hartford R.R. v. Gray, 240 F.2d 460 (2nd Cir. 1957).

190. GILMORE & BLACK, *supra* note 3, at 765.

191. Jones & Laughlin Steel Corp. v. Vang, 73 F.2d 88, 91 (3d Cir. 1934).

192. Guzman v. Pichirilo, 369 U.S. 698 (1962); Fitzgerald v. A.L. Burbank & Co., 451 F.2d 670 (2nd Cir. 1971).

193. Dailey v. Carroll, 248 F. 466 (2nd Cir. 1917).

194. The Barnstable, 181 U.S. 464 (1901); Sheriffs v. Pugh, 22 Wis. 273 (1867).

195. Nichimen Co. v. M.V. Farland, 462 F.2d 319 (2nd Cir. 1972); Bergan v. International Freighting Corp., 254 F.2d 231 (2nd Cir. 1958).

A "voyage charter" is rarely used by recreational boaters. The legal status of the charter is the same as for the time charter.

CONCLUSION

As discussed above, Wisconsin has two possible legal rules applicable to a recreational boat accident. The federal admiralty rules are to be used by either the state or federal courts if the accident occurred on the Great Lakes or the Mississippi River. The state rules are applicable to a Wisconsin inland waters tort and/or nonemployee wrongful death action in either state court or on the law side (nonadmiralty) of the federal court. While admiralty court can grant an in rem judgment against the boat, this usually is not advantageous because of the relatively low value of the boat relative to the tort damages. Most suits, therefore, would be in personam in either state or federal court, rather than in rem.

In short, the significant differences between a federal admiralty suit and an inland waters state action are found in the admiralty procedures of no jury trial, varying degrees of fault, divided damages without comparison of negligence, more explicit navigational rules of the road, and specific insurance coverage and policy interpretations distinct from nonadmiralty insurance policies. Furthermore, admiralty procedures bar most common law and state statutory defenses. A tortfeasor may be exonerated for post-tort actions if he stands by and renders assistance after the accident. Vicarious and limited liability may be imposed on the nonnegligent boat owner plus the duty of maintenance and cure upon a boat owner when neither he nor a crew member is at fault for the crew member's injury.

When faced with a Wisconsin boating accident case, counsel must make a careful evaluation of whether the suit should be started in state or federal court, and if started in state court, whether it should be removed to federal court. The judicial determination of whether the case is at law or in admiralty may largely determine the outcome of the suit and the relative liabilities of the parties.